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No. 82-857

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE D. BUSBEE, ET AL., APPELLANTS

v.

WILLIAM FRENCH SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether a congressional reapportionment plan enacted with discriminatory purpose violates Section 5 of the Voting Rights Act of 1965, although it has no retrogressive effect.

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The Attorney General moves pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the district court.

OPINION BELOW

The district court's opinion (J.S. App. 1a-49a) is reported at 549 F. Supp. 494.

JURISDICTION

The district court's opinion and order denying declaratory relief were entered on July 22, 1982 (J.S. App. 1a-51a). The notice of appeal was filed on July 26, 1982 (J.S. App. 52a-53a). On September 8, 1982, this Court granted appellants' motion for an extension of time to November 23, 1982, to file the Jurisdictional Statement, and it was filed on November 22, 1982. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATEMENT

1. Following the 1980 census, the State of Georgia determined that it would have to reapportion its congressional districts to comply with the one-person, one-vote rule (J.S. App. 2a). The state legislature enacted a reapportionment plan, Act No. 5, on September 22, 1981 (*ibid.*), and submitted the plan to the Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965 (*id.* at 1a).[1]

On February 11, 1982, Assistant Attorney General Reynolds, acting on behalf of the Attorney General, entered an objection to Act No. 5 (J.S. App. 1a). The basis for that objection was the Assistant Attorney General's inability to conclude that in drawing the line between the Fourth and Fifth Congressional Districts, the legislature did not have the discriminatory purpose of minimizing black voting strength in the Fifth District (J.S. 8-9).[2] Because the State had failed to meet its obligation under Section 5 to demonstrate the absence of discriminatory purpose, as well as discriminatory effect, the Assistant Attorney General denied preclearance (J.S. 9).

2. On March 8, 1982, appellants filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that Act No. 5 did not violate Section 5 (J.S. 9). After a four-day trial (*ibid.*), the three-judge court

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[1]Section 5 prohibits covered jurisdictions, including the State of Georgia, from enacting or seeking to administer any "standard, practice, or procedure with respect to voting" unless it is precleared by the Attorney General or unless the District Court for the District of Columbia issues a declaratory judgment that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. 1973c.

[2]The Assistant Attorney General concluded that because Act No. 5 increased the black population in the Fifth District, it did not have the retrogressive effect prohibited by Section 5 (J.S. 8-9). See *Beer* v. *United States*, 425 U.S. 130 (1976).

concluded, in a unanimous opinion with detailed factual findings regarding the enactment of Act No. 5 (J.S. App. 2a-43a), that while the plan was not retrogressive within the meaning of *Beer* v. *United States*, *supra*, (*id.* at 44a), the boundaries of Congressional Districts Four and Five had been drawn with a racially discriminatory purpose in violation of Section 5 (*id.* at 47a).

The court emphasized that reapportionment is a legislative responsibility, but that reapportionment must, pursuant to the Voting Rights Act of 1965, be conducted without racial discrimination (J.S. App. 48a). The court expressed no opinion on what plan would have emerged from a process free of discrimination, but found it clear from the record that such a process would have produced different boundaries (*ibid.*). The court accordingly denied the State's request for declaratory relief, and enjoined the State from implementing its plan for redistricting the Fourth and Fifth Districts (*id.* at 50a-51a).[3] On August 2, 1982, this Court denied appellants' application for a stay of the injunction (Justice Brennan, and Justice Stevens, on resubmission).[4]

ARGUMENT

Relying on *Beer* v. *United States*, 425 U.S. 130 (1976), and *City of Richmond* v. *United States*, 422 U.S. 358 (1975), appellants urge that the district court erred in concluding that Act No. 5 contravenes Section 5 of the Voting

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[3]The State later received the court's approval of an alternative plan for apportioning the Fourth and Fifth Districts; the legislation enacting that plan provides that it will become ineffective, and Act No. 5 will be reinstated, in the event that this Court reverses the district court's judgment (J.S. 10 n.5).

[4]An earlier request for a stay of a prior injunctive order was denied by the Chief Justice on May 25, 1982, and by Justice Rehnquist on June 1, 1982.

Rights Act of 1965 because it was enacted with discriminatory purpose (J.S. 10-22). That contention is not only based on a misreading of *Beer* and *City of Richmond*, it is contrary to the express language of Section 5, which provides that in order to obtain preclearance of a proposed electoral change, a covered jurisdiction must prove the absence of *both* discriminatory effect and purpose (42 U.S.C. 1973c). This Court has consistently recognized the two parts of the statutory standard. *City of Port Arthur* v. *United States*, No. 81-708 (Dec. 13, 1982), slip op. 8; *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980); *Beer* v. *United States*, *supra*, 425 U.S. at 136, 141; *City of Richmond* v. *United States*, *supra*, 422 U.S. at 372; *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *Perkins* v. *Matthews*, 400 U.S. 379, 387, 388 (1971). Appellants seek to drain Section 5 of half its meaning by arguing that if a change does not have the *effect* of diminishing the voting strength of blacks, it cannot violate Section 5, regardless of the *purpose* with which it was enacted.

In *City of Richmond*, *supra*, this Court concluded that Richmond's annexation of additional territory did not have a discriminatory effect under Section 5, but it remanded the case for consideration whether that annexation was motivated by a discriminatory purpose, explaining that Congress explicitly prohibited changes with a discriminatory purpose, whether or not they produced retrogression, because purposeful discrimination always represents a "gross racial slur[]" on black citizens (422 U.S. at 378).

Appellants attempt to distinguish the plain meaning of *City of Richmond* by arguing (J.S. 18) that it predates *Beer*, in which it was described as a case that "decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5" (*Beer* v. *United States*, *supra*, 425 U.S. at 139 n.11). But nothing in *Beer* is inconsistent with the language of *City of Richmond*, nor

does it purport to narrow the meaning of that case.[5] Indeed, the principle that discriminatory intent, by itself, bars Section 5 preclearance has recently been reaffirmed by this Court in *City of Port Arthur* v. *United States, supra*, slip op. 8-9.

The district court here correctly noted (J.S. App. 44a-45a) that in *Beer* this Court recognized that nonretrogression is not the only test for compliance with the Voting Rights Act of 1965. Even an ameliorative plan violates Section 5 if it so discriminates on the basis of race or color as to be unconstitutional. *Beer* v. *United States, supra*, 425 U.S. at 141 n.12. Thus, under *Beer*, although Act No. 5 does not produce a retrogression in the Fifth Congressional District, it violates Section 5 because, as the district court found, it was adopted with the intent of minimizing black voting strength in the Fifth District, and that "invidious discriminatory purpose" violates the Constitution (J.S. App. 45a).

The core of appellants' argument is that the only discriminatory purpose that violates Section 5 is a purpose to "reduc[e] the present level of black voting strength" (J.S. 22)—i.e., to cause retrogression. This extreme position ignores the adverse consequences to minorities who are the victims of purposefully discriminatory conduct, even conduct that is not retrogressive. As the district court found, the purposefully discriminatory conduct in this case deprived minority voters of the degree of voting strength that would have been theirs but for the improper consideration of race

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[5]It is clear that the retrogression requirement in *Beer* applies only to the "effect" aspect of Section 5, not to the "purpose" aspect. On remand in *Beer*, all parties agreed that the question whether the New Orleans reapportionment plan had a discriminatory purpose remained to be decided (see also 425 U.S. at 136 n.7). On July 29, 1976, the district court issued a declaratory judgment holding that it did not (Civil Action No. 1495-73).

(J.S. App. 47a-49a). Absent racial discrimination, Georgia might well have adopted a plan that would have placed a majority of black voters in the Fifth District, rather than one under which the majority of voters in that district remained white. Thus, minority voters may have been deprived by an impermissible consideration of race of their only realistic chance to elect a candidate of their choice.[6]

The district court correctly applied well-settled principles under Section 5, and appellants have presented no question warranting plenary review by this Court. Accordingly, the district court's judgment should be affirmed.

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[6]Moreover, as this Court explained in *City of Richmond, supra*, 422 U.S. at 378:

> [I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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